AUG 18 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1944

No. 361

In the Matter of the Application of the

UNITED STATES OF AMERICA,

Respondent,

for a Writ of Prohibition and/or Mandamus

against

The Honorable FRANCIS G. CAFFEY, Judge of the District Court of the United States for the Southern District of New York, et al.,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

CHAUNCEY I. CLARK
EUGENE UNDERWOOD
LEONARD J. MATTESON
RICHARD F. SHAW
Counsel for Petitioners

INDEX

PAGE

PETITION FOR WRIT OF CERTIORARI 1

Jurisdiction 2

Opinions Below 2

Summary Statement 2

Question Presented 5

Statute Involved 5

Reasons for Granting the Writ 5

BRIEF IN SUPPORT OF PETITION 9

FIRST POINT—The question presented is one of general importance and calls for determination by this Court 9

SECOND POINT—The ARCHER was a "public vessel of the United States" 11

THIRD POINT—The legislative history of the Act establishes that Congress deliberately intended to authorize suit in cases such as this 14

FOURTH POINT—The provisions for liability as *in rem* establish that Congress intended to grant jurisdiction in cases such as this 17

LAST POINT—It is respectfully submitted that the writ of certiorari prayed for should be granted, that the order for a writ of prohibition made by the Circuit Court of Appeals be reversed and the jurisdiction of the District Court sustained with costs 21

CASES CITED

	PAGE
The Barnstable, 181 U. S. 464, 467	20
Bengzon v. Secretary of Justice, 299 U. S. 410, 416	12
The China, 7 Wall. 53, 68-9	20
The Coldwater, 283 Fed. 146	20
Ellis v. United States, 206 U. S. 246, 259	12
The Florence H., 248 Fed. 1012	20
The John G. Stevens, 170 U. S. 113, 120	20
The Moosabee, 7 F. (2d) 501, aff'd 1 F. (2d) 964, C. C. A. 4	20
Poe v. Seaborn, 282 U. S. 101	12
Ralli v. Troop, 157 U. S. 386, 402-3	20
State of Maine v. United States, 45 F. Supp. 35, aff'd 134 F. (2d) 574, C. C. A. 1, cert. denied 319 U. S. 772	19
United States v. Caffey, 141 F. (2d) 69, C. C. A. 2	2, 4
Ex Parte United States, 319 U. S. 730	4

OTHER AUTHORITIES

Congressional Record, 68th Congress, 2nd Session, January 19, 1925, p. 2087	16
Congressional Record, 68th Congress, 2nd Session, February 12, 1925, p. 3560	16
Fifteenth Report to Congress on Lend-Lease Operations for Period Ended March 31, 1944	10
House Report 913, 68th Congress, 1st Session	14, 15, 18
Lend-Lease Act	12
Public Vessels Act (Title 46 U. S. Code)	3, 5, 12, 13, 14, 18, 19
Senate Report 941, 68th Congress, 2nd Session	14, 15, 18, 20
Suits in Admiralty Act	19

Supreme Court of the United States

OCTOBER TERM 1944

No.

In the Matter of the Application of the

UNITED STATES OF AMERICA,

Respondent,

for a Writ of Prohibition and/or Mandamus

against

The Honorable FRANCIS G. CAFFEY, Judge of the District Court of the United States for the Southern District of New York, et al.,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, the Honorable Francis G. Caffey, Judge of the District Court of the United States for Southern New York, *et al.*, pray that a writ of certiorari issue to review the order (R. 53) of the United States Circuit Court of Appeals for the Second Circuit filed May 2, 1944, grant-

ing a writ prohibiting the petitioners from the further exercise of jurisdiction in an admiralty suit pending in the District Court for Southern New York wherein Agwilines Inc., as owner of steamship BRAZOS, and Olivarria & Company *et al.*, as owners of cargo in the BRAZOS, are libellants, and the United States is respondent.

Jurisdiction

Jurisdiction is based on Section 240(a) of the Judicial Code as amended, 28 U. S. Code 347.

The order of the Circuit Court of Appeals was filed May 2, 1944 (R. 53). By an order signed June 19, 1944 Mr. Justice Jackson extended the time of petitioners for the filing of this petition through August 22, 1944.

Opinions Below

The opinion of the District Court sustaining its jurisdiction is not reported except at 1943 A. M. C. 715. It is printed at pages 17-29 of the record.

The opinion of the Circuit Court of Appeals is reported, *United States* v. *Caffey*, 141 F. (2d) 69, C. C. A. 2, and is printed at pages 37-43 of the record.

Summary Statement

On January 13, 1942 steamship BRAZOS, owned by Agwilines Inc. and carrying cargo owned by Olivarria & Company *et al.*, was sunk in collision with steamship ARCHER, formerly called MORMACLAND, owned by the United States. On April 15, 1942 Agwilines Inc. filed its libel

(R. 8-10) against the United States alleging that the ARCHER, or MORMACLAND, was owned by the United States; that prior to the collision the custody of the vessel had been transferred to the United States Navy, whereupon she became a public vessel of the United States, and that at the time of the collision she was a public vessel of the United States. Libellant elected to have the suit proceed in accordance with the principles of libels both *in personam* and *in rem* (R. 10). Jurisdiction was predicated on the Public Vessels Act, March 3, 1925, Title 46 U. S. Code, §781, which authorizes suit against the United States for damages "caused by a public vessel of the United States".

The allegations of the intervening petition of Olivarria & Company *et al.* are substantially identical with those of the libel (R. 13-17).

The United States appeared specially and filed exceptive allegations asserting that in May, 1941 the United States Maritime Commission purchased the ARCHER; that the United States thereupon became the owner thereof; that she was converted for use as a war vessel; that on November 17, 1941 she was physically delivered to the British Admiralty and thereafter, with the consent of the United States, was continuously in the possession and under the exclusive command and control of the British Government, commanded, officered, manned and operated by the British Government as a war vessel (R. 11-13).

The exceptive allegations erroneously asserted that prior to the delivery of the vessel to the British Government her American documentation had been cancelled. However, respondent conceded below that the American documentation of the ARCHER was never cancelled.

The libellants moved to strike out the exceptive allegations. The motion was granted and the Court required the United States to answer on the merits, holding that the ARCHER was a "public vessel of the United States" inasmuch as she was owned by the United States and employed for a public purpose (Opinion, R. 17-29).

Thereafter respondent filed in the Circuit Court of Appeals a motion for leave to file a petition for a writ of prohibition or mandamus. The Circuit Court of Appeals denied the motion for want of jurisdiction (R. 30).

Respondent then filed in this Court a petition for a writ of prohibition or mandamus together with a prayer for a writ of certiorari, No. 15 Original, October Term, 1942. This Court granted the petition for certiorari and at the same time, June 7, 1943, in a *per curiam* opinion, reversed the decision of the Circuit Court of Appeals denying the petition for want of jurisdiction and remanded the cause to the Circuit Court of Appeals for further proceedings. *Ex Parte United States,* 319 U. S. 730 (R. 31-32).

Thereafter respondent filed in the Circuit Court of Appeals its petition for a writ of prohibition and/or mandamus and, after argument, the Court granted respondent's petition in an opinion filed March 3, 1944. Although conceding that the ARCHER was owned by the United States and employed for a public use the Circuit Court of Appeals held that she was not a "public vessel of the United States" because she was not controlled by any department or independent establishment of the United States at the time of the collision (Opinion, R. 37-43). *United States* v. *Caffey,* 141 F. (2d) 69, C. C. A. 2.

Petitioners' petition for rehearing was denied (R. 44-50).

Question Presented

Does the Public Vessels Act, Title 46 U. S. Code, §§ 781-790, authorize suit against the United States on principles of *in rem* liability to recover damages caused by a war vessel owned by, and documented as, a vessel of the United States but in the possession of the British Government and operated as a unit of its Navy pursuant to the provisions of the Lend-Lease Act in the interest of the national defense of the United States?

Statute Involved

Section 1 of the Public Vessels Act (March 3, 1925, c. 428, §1, 43 Stat. 1112; Title 46 U. S. Code §781) provides:

> "A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States * * *."

Reasons for Granting the Writ

1. The ARCHER, government-owned, was one of a large number of government-owned vessels which have been delivered to foreign governments under the Lend-Lease Act but which continue to be owned by the United States. There are numerous cases of damage caused by these vessels and it is of the utmost importance to the steamship industry, as well as to the United States, to obtain a final and authoritative decision as early as possible on the question whether such vessels are "public vessels of the United

States", for the torts of which the United States is suable under the Public Vessels Act.

2. The decision below is erroneous, being based exclusively upon a procedural provision of the Act and ignoring

(a) the fact that the ARCHER was owned by, i.e. was a "vessel of", the United States employed in the "public" service, i.e. the defense of the United States;

(b) the plainly declared purpose of the Act as appears from its legislative history, and

(c) the liability of the United States on *in rem* principles, a liability plainly assumed by the terms of the Act.

WHEREFORE petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and of the proceedings in the case numbered and entitled on its dockets "No. 38, October Term, 1943, In the Matter of the Application of the United States of America, Petitioner, For a Writ of Prohibition and/or Mandamus, against The Honorable Francis G. Caffey, Judge of the District Court of the United States for the Southern District of New York, and the other Judges and Officers of said Court, Respondents", and that the decision of said Circuit Court of Appeals in said case be reversed, and the order for a writ of prohibition be

vacated, and that your petitioners have such other and further relief in the premises as may be just.

THE HONORABLE FRANCIS G. CAFFEY,
JUDGE OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE SOUTHERN
DISTRICT OF NEW YORK ET AL.

By CHAUNCEY I. CLARK
Counsel

New York, N. Y.
August 16, 1944.

Supreme Court of the United States

OCTOBER TERM 1944

No.

In the Matter of the Application of the

UNITED STATES OF AMERICA,

Respondent,

for a Writ of Prohibition and/or Mandamus

against

The Honorable FRANCIS G. CAFFEY, Judge of the District Court of the United States for the Southern District of New York, et al.,

Petitioners.

BRIEF IN SUPPORT OF PETITION

FIRST POINT

The question presented is one of general importance and calls for determination by this Court.

Respondent does not deny that the ARCHER was owned by the United States but asserts that the ARCHER, having been converted into a Naval vessel, was physically delivered to the British for use as unit of the British Navy pursuant to the provisions of the Lend-Lease Act.

Many hundreds of self-propelled vessels, convoy-escort aircraft carriers, destroyers, landing barges, PT boats, and other fighting craft, as well as cargo vessels, have been delivered to the British and to our other Allies under the Lend-Lease Act. Ownership of all of these remains in the United States. In his Fifteenth Report to Congress on Lend-Lease Operations for the Period Ended March 31, 1944 the President said:

> "The export figures show not quite $200,000,000 worth of watercraft sent to the United Kingdom. That is the cost of the landing barges, the PT boats and other fighting craft small enough to be shipped aboard cargo vessels. We have also leased to the British over 30 convoy-escort aircraft carriers and many more destroyer escorts and corvettes, in addition to merchant ships. Ships that are leased and sail away under their own power are not included in the export figures. We have leased to the British most of the 1,400 naval craft so far turned over to the forces of our allies. All warships and merchant ships leased under the Lend-Lease Act are leased for the duration of the war. Title remains with the United States" (p. 17).

Many of these vessels, owned by the United States, have been in collision and have caused damage to privately owned vessels and other property. Many claims exist against the United States because of damage done by this vast fleet, these claims being on the theory of liability *in rem,* which the District Court held was contemplated by the Public Vessels Act. The decisions of the Courts below are, we believe, the only decisions on the point involved but, in view of the large volume of potential litigation and the fact that the Circuit Court of Appeals based its decision primarily upon a procedural provision of the statute in disregard of the many reasons to the contrary, an authoritative decision by this Court is, we believe, called for.

The circumstances of this case illustrate the need for an early decision. Theoretically the British Government is liable (assuming negligence) because of the fault of its servants in command of the ARCHER and the British Government allows suit against its commanding officer provided the suit is brought within one year. In the case at bar the decision of the District Court sustaining the jurisdiction was handed down fourteen months after the collision and the decision of the Circuit Court of Appeals denying the jurisdiction was not handed down until more than two years after the collision. It was then too late for the libellants to proceed in Britain. Many claims in other cases await a final determination of the jurisdictional question in this case by this Court in the hope and belief that it will not be necessary for American shipowners to prosecute in England *in rem* claims against vessels admittedly owned by the United States.

SECOND POINT

The ARCHER was a "public vessel of the United States".

The statute confers jurisdiction of suits against the United States for "damages caused by a public vessel of the United States". If the ARCHER was a "public vessel of the United States" the District Court has jurisdiction. She was a "public" vessel because she was a Naval vessel engaged in the defense of the United States, and she was a "vessel of the United States" because she was owned by the United States.

The delivery of the ARCHER to the British for operation by them as a unit of their Navy was, according to re-

spondent's exceptive allegations "made pursuant to the provisions of Public Law 11, 77th Congress, 1st Session, approved March 11, 1941" (R. 12), i.e. the Lend-Lease Act, c. 11, Sec. 3, 55 Stat. 31, Title 22 U. S. Code, Sec. 412. This section empowers the President "when he deems it in the interest of national defense" to authorize the loan, lease, etc. of any "defense article", which includes ships, to "the government of any country whose defense the President deems vital to the defense of the United States". It is inescapable, therefore, that the President deemed the defense of Britain vital to the defense of the United States when the ARCHER was delivered to the British. Therefore, although in the British service, she was engaged in the defense of the United States. It cannot be denied that this is a "public" service.

Respondent admits ownership of the ARCHER, which requires the conclusion that she was a "vessel of the United States". The title of the Public Vessels Act is

> "An Act authorizing suits against the United States in admiralty for damage caused by and salvage services rendered to public vessels *belonging to* the United States, and for other purposes" (Italics ours).

The title may be resorted to for clarification if need be. *Bengzon* v. *Secretary of Justice,* 299 U. S. 410, 416. Therefore, the words of Sec. 1 of the Act, "vessel of the United States", mean "vessel belonging to the United States". This is the natural meaning of the phrase "of the United States". *Ellis* v. *United States,* 206 U. S. 246, 259; *Poe* v. *Seaborn,* 282 U. S. 101.

The Circuit Court of Appeals conceded that it is "indeed, a plausible conclusion" (R. 41) that the ARCHER was a "public vessel of the United States". However, the Court re-

fused to accept as a fact respondent's admission that the United States owned the ARCHER, saying that "the question of her ultimate disposition, and indeed of her actual ownership, was left at large by the Lend-Lease Act * * *" (R. 42—compare the President's statement that "Title [to lend-lease vessels] remains with the United States" (supra, p. 10). Then the Circuit Court of Appeals, relying solely upon an administrative provision of the Act to determine its scope, held that the District Court was without jurisdiction by reason of Section 4 of the Act. This section provides:

> "No officer or member of the crew of any public vessel of the United States may be subpoenaed in connection with any suit authorized under this Act without the consent of the Secretary of the Department or the head of any independent establishment of the government having control of the vessel at the time the cause of action arose, or of the master or commanding officer of such vessel at the time of the issuance of such subpoena" (46 U. S. Code, Section 784).

The Court entertained the view that the language of this section limits the grant of jurisdiction to damage caused by public vessels of the United States under the control of some department or some independent establishment of the United States. In other words, the Court, because of Section 4, has added to Section 1 after the words "damages caused by a public vessel of the United States" the words, *not* chosen by Congress, "while in the control of some department or some independent establishment of the United States".

Section 1 of the Act contains the grant of jurisdiction and there are no words of limitation such as those inserted by the Circuit Court of Appeals. The only requirement imposed by Congress is that the damage be "caused by a public vessel of the United States".

Section 4 does not purport to deal with the class of cases of which jurisdiction is granted but deals only with the conditions upon which witnesses from the public vessel may be subpoenaed. It requires that the consent either of the Secretary of the Department or head of the independent establishment of the government having the control of the vessel at the time the cause of action arose *or* the master of such vessel at the time of the issuance of the subpoena be obtained in advance. This section is readily applicable, without distortion, to the situation at bar, i.e. although the ARCHER was not under the control of any department or independent establishment of the United States when the cause of action arose, none of her officers or crew could be subpoenaed without first obtaining the consent of the master or commanding officer of the vessel at the time of the issuance of the subpoena.

THIRD POINT

The legislative history of the Act establishes that Congress deliberately intended to authorize suit in cases such as this.

Prior to the enactment of the Public Vessels Act Congress had been obliged to consider, and had adopted, numerous private acts authorizing suit for damage caused by public vessels. One of its purposes in adopting the Act was to avoid this unnecessary labor by adopting general legislation. The reports of the Senate and House Committees on Claims, which are identical, state:

> "The chief purpose of this bill is to grant private owners of vessels and of merchandise a right of action when their vessels or goods have been damaged as

> the result of a collision with any government-owned vessel, though engaged in public service, without requiring an application to Congress in each particular instance for the passage of a special enabling act" (House Report 913, 68th Congress, 1st Session, page 1; Senate Report No. 941, 68th Congress, 2nd Session, page 1).

It is noteworthy that the words employed are "government-owned vessel".

A coeval purpose was to correct what both Committees called the "injustice" of the previously existing situation whereby the United States could sue the privately-owned vessel or her owner for collision damage to public vessels owned by the United States but the private owner could not sue the United States for the damage sustained by him in the same collision. The Committees said:

> "Under the law as it now stands, no judicial relief is available to a shipowner for damages caused by the negligent navigation of a public vessel of the United States. * * *
>
> Nevertheless, the United States, while immune from the action of a private suitor in such cases, may, and does, sue the vessels of private owners, has its day in Court without the risk of costs being awarded against it, and, when the government vessel is found to have been at fault, refuses to pay the damages sustained by the private owner (*The Esparta*, 160 Fed. 289).
>
> The injustice of such a system of relief has often been expressly recognized by Congress and by the courts" (Committee reports, supra, p. 2).

In other words, the Committees intended to enact reciprocity so that when a public vessel owned by the United States and a privately owned vessel come into collision the private owner can sue the United States for damage to his vessel just as the United States can sue the private owner for the damage done to the vessel belonging to the

United States. As owner of the ARCHER the United States could sue Agwilines, Inc. for the damage suffered by the ARCHER and could have sued the BRAZOS *in rem* had she not become a total loss. The decision below, contrary to the plainly declared intent of the Committees, deprives the private owner of the reciprocal right to sue the United States.

The debates in the Senate and House confirm the foregoing. In the House Mr. Underhill, who introduced and sponsored the bill, said:

> "The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged by collision or other fault *of Government vessels* and Government agents." Congressional Record, 68th Congress, 2d Session, January 19, 1925, p. 2087 (italics ours).

In the Senate, Senator Bayard, who sponsored the bill, said:

> "Mr. President, the Senator from Arkansas is quite right; it is a measure of great importance. There are continuous applications being made to the Claims Committee of both Houses for the consideration of bills to reimburse people who have suffered damage from maritime accidents in which *United States vessels* are concerned, to enable them to present their suits in the various district courts. In this last Congress there were nearly 200 such claim bills introduced in the two Houses.
>
> Outside of that, there are many claims which must be settled by the Department of State, because our own nationals are forbidden going into our own Courts, and the nationals of other countries cannot come in, and this bill is to remedy that situation. It would give a person aggrieved because of an accident *by reason of the shortcomings of a United States ship* the right to go into a district court and prosecute his action." Congressional Record, 68th Congress, 2d Session, February 12, 1925, p. 3560 (italics ours).

Nothing in the legislative history of the Act indicates any purpose to confine the jurisdiction to situations where government-owned vessels are operated by departments or independent establishments of the United States. We do not doubt that Lend-Lease was not contemplated by Congress when the Public Vessels Act was before it. On the other hand, in enacting the Lend-Lease Act Congress could, had it wished, have excluded vessels loaned or leased to foreign governments from the Public Vessels Act by a simple proviso. Since reciprocity of suit was one of the cardinal reasons for the Act, and since the United States can sue the private owner for damage to vessels owned by it although they have been delivered under lend-lease to foreign governments, the private owner should not be deprived of the reciprocal right to sue which Congress plainly intended he should have.

FOURTH POINT

The provisions for liability as *in rem* establish that Congress intended to grant jurisdiction in cases such as this.

Below respondent attempted to evade the question by arguing that the Act should not be considered as authorizing suit against the United States for a tort committed by a foreign government. True, the ARCHER's tort was a tort of the British government because its personnel was in control. However, in admiralty, the vessel, as a legal entity, is liable *in rem* for her torts and Congress has authorized suit against the United States *in personam* in form but upon the principles of liability *in rem* as well as

in personam. The libellant elected to proceed *in rem* (R. 10).

Section 1 of the Act authorizes suit for damage "caused by a public vessel of the United States". The vessel is personified and spoken of as the offending thing. Section 2 of the Act provides that the suit shall be brought in the district where "the vessel or cargo charged with creating the liability is found". Here again the vessel is personified and referred to as "creating the liability". The language of both sections plainly contemplates liability *in rem*.

In his letter of recommendation to the Committee on Claims concerning the bill which became the Public Vessels Act Mr. Chief Justice Stone, then Attorney General, declared his understanding that the vessel was regarded as the offender and that the bill authorized suit on *in rem* principles—see pages 11-12 of Senate Report No. 941, 68th Congress, 2d Session, and House Report No. 913, 68th Congress, 1st Session:

> "Suggestions which have come to my notice favoring the bill include the view that the practice of admiralty and international law and procedure place such torts separate and apart from the ordinary torts committed on land, as the vessel is defined the offender rather than the owner of the vessel.
>
> * * * * * * * *
>
> "I do not understand from the proposed bill whether the relief to be granted shall be determined upon principle of *in rem* liability solely or whether it shall be determined both *in rem* and *in personam* liability." (Italics ours.)

Patently the then Attorney General understood that the Act contemplated *in rem* liability and was doubtful only whether the Act contemplated *in personam* liability as well.

Furthermore the Public Vessels Act expressly incorporates the provisions of the Suits in Admiralty Act. Section 2 of the Public Vessels Act provides:

> "* * * Such suits shall be subject to and proceed in accordance with the provisions of Chapter 20 or any amendment thereof, insofar as the same are not inconsistent herewith, except that no interest shall be allowed * * *."

Chapter 20 is the Suits in Admiralty Act, Section 3 of which provides in part as follows:

> "Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties * * *. If the libellant so elects in his libel, *the suit may proceed in accordance with the principles of libels in rem* wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libellant in any proper case from seeking relief in personam in the same suit. * * *" March 9, 1920, c. 95, §3, 41 Stat. 526; Title 46 U. S. Code, Section 743 (italics ours).

In *State of Maine* v. *United States*, 45 F. Supp. 35, aff'd 134 F. (2d) 574, C. C. A. 1, cert. denied 319 U. S. 772, the Court held that the Public Vessels Act should be construed with the Suits in Admiralty Act as a part of the same legislative scheme and that Congress, by the Public Vessels Act, intended to give to private vessel owners "the same rights against the government that they had against each other" (p. 37). Indeed the Circuit Court of Appeals in the case at bar said:

> "The two statutes are to be construed together as part of a plan to give to private owners and operators of vessels the same right of recovery from the government for damages caused by public vessels which they had against each other" (R. 40).

Mr. Chief Justice Stone, then Attorney General, in his letter of recommendation concerning the bill which became the Public Vessels Act said:

> "The proposed bill intends to give the same relief against the government for damages caused by collision by its public vessels and for compensation for towage and salvage services rendered to public vessels as is now given against the United States in the operation of its merchant vessels, as provided by the Suits in Admiralty Act of March 9, 1920" (p. 11, Senate Report No. 941, 68th Congress, 2d Session).

Since this was admittedly the purpose of Congress, since the Suits in Admiralty Act expressly authorizes suit on principles of liability *in rem*, and since the Public Vessels Act expressly incorporates the provisions of the Suits in Admiralty Act, the District Court has jurisdiction of claims against the United States based upon allegations of liability *in rem*. It is well established that when a vessel is in collision she is liable *in rem* although officered, manned and controlled by servants of another rather than her owner. *The Barnstable*, 181 U. S. 464, 467; *The China*, 7 Wall. 53, 68-9; *Ralli* v. *Troop*, 157 U. S. 386, 402-3; *The John G. Stevens*, 170 U. S. 113, 120; *The Moosabee*, 7 F. (2d) 501, aff'd 1 F. (2d) 964, C. C. A. 4; *The Coldwater*, 283 Fed. 146; *The Florence H.*, 248 Fed. 1012.

LAST POINT

It is respectfully submitted that the writ of certiorari prayed for should be granted, that the order for a writ of prohibition made by the Circuit Court of Appeals be reversed and the jurisdiction of the District Court sustained with costs.

CHAUNCEY I. CLARK
EUGENE UNDERWOOD
LEONARD J. MATTESON
RICHARD F. SHAW
Counsel for Petitioners

New York, N. Y.
August 16, 1944.

(P-584)

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	7
Conclusion	13
Appendix	15

CITATIONS

Cases:	
Agwilines, Inc., as Owner of the Steamship Brazos and as a bailee of the cargo laden therein, libelant against *the United States of America, respondents*, in admiralty, No. 124–337	3
Attualita, The, 238 Fed. 909	10
Baltimore Dry Docks & Ship Building Co. v. *New York & P. R. S. S. Co.*, 262 Fed. 485	11
Carlo Poma, The, 259 Fed. 369	10
Compania Espanola v. *Navemar*, 303 U. S. 68	9
Davis, The, 10 Wall. 15	10
Dobson v. *United States*, 27 F. (2d) 807, certiorari denied, 278 U. S. 653	11
Exchange, The, 7 Cranch 116	10
Ex Parte United States of America, No. 15, Original, October Term, 1942	6
Long v. *The Tampico*, 16 Fed. 491	10
O'Neal v. *United States*, 11 F. (2d) 869, affirmed, *per curiam*, 11 F. (2d) 871	11
State of Maine v. *United States*, 45 F. Supp. 35, affirmed, 134 F. (2d) 574, certiorari denied, 319 U. S. 772	13
United States v. *Sherwood*, 312 U. S. 584	13
Walton v. *United States*, 24 C. Cls. 372	8
Western Maid, The, 257 U. S. 419	9, 12
Statutes:	
Lend-Lease Act of March 11, 1941, c. 11 (55 Stat. 31, 22 U. S. C. (Supp. I), Secs. 411–422):	
Sec. 3	19
Sec. 4	21

Statutes—Continued. Page

Public Vessels Act of March 3, 1925, c. 428 (43 Stat. 1112, 46 U. S. C., Secs. 781–790):

Sec. 1 ..... 7, 12, 13, 15
Sec. 2 ..... 13, 15
Sec. 4 ..... 7, 8, 16
Sec. 8 16

Suits in Admiralty Act of March 9, 1920, c. 95 (41 Stat. 525, 46 U. S. C., Secs. 741–752):

Sec. 1 17
Sec. 2 ..... 12, 17
Sec. 3 ..... 13, 18

Miscellaneous:

House Report No. 913, 68th Cong., 1st Sess 10, 12
Report on the First Year of Lend-Lease Operations, H. Doc. No. 661, 77th Cong., 2d Sess., pp. 50–52 5
Senate Report No. 941, 68th Cong., 2d Sess 8, 10, 12

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 361

HONORABLE FRANCIS G. CAFFEY, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 17–29) is reported in 1943 A. M. C. 715. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 37–41) is reported in 141 F. (2d) 69.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered on May 2, 1944 (R. 47–49). By an order of

June 19, 1944, Mr. Justice Jackson extended the time for filing a petition for a writ of certiorari to August 22, 1944 (R. 50). The petition for a writ of certiorari was filed on August 18, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Public Vessels Act of 1925 authorizes suit against the United States for damages to a private vessel and its cargo caused by a vessel which had been transferred by the United States to the British government pursuant to the Lend-Lease Act, and which at the time of the accident was manned, officered, controlled, and operated by the British government as a unit of the Royal Navy.

STATUTES INVOLVED

The relevant portions of the statutes involved are set forth in the Appendix, pp. 15–21, *infra*.

STATEMENT

On May 3, 1943, the United States instituted this proceeding in the United States Circuit Court of Appeals for the Second Circuit by filing a motion for leave to file a petition for a writ of prohibition and/or mandamus against the Honorable Francis G. Caffey, Judge of the District Court of the United States for the Southern District of New York and against the other judges

and officers of the court (R. 2–3). The petition sought to prohibit these judges and officers from further exercising jurisdiction in the case of *Agwilines, Inc., as Owner of the Steamship "Brazos" and as Bailee of the Cargo Laden Therein, Libelant,* v. *United States of America, Respondents,* In Admiralty, No. 124–337, and to compel them to vacate an order entered by Judge Caffey on April 3, 1943, dismissing the exceptive allegations filed in that case by the United States and directing the United States to answer the libel and intervening petition in the case (R. 3–30).

The facts set forth in the petition for prohibition and mandamus may be summarized as follows (R. 3–7, 8–10):

On April 15, 1942, Agwilines, Inc., a Maine corporation, as owner of the Steamship *Brazos* and bailee of its cargo, filed a libel *in personam* in admiralty against the United States in the District Court of the United States for the Southern District of New York, seeking to recover $850,000 for damages incurred in the loss of the *Brazos* and her cargo (R. 8–10). The libel in substance alleged that on January 13, 1942, a motor vessel owned by the United States (formerly named the *Mormacland*) collided with the *Brazos,* causing the damages in question; that the collision was due solely to the fault and negligence of the motor vessel and those in charge of her; and that at the time of the collision, the motor vessel was a "public vessel of the United States."

The United States, appearing specially to challenge the jurisdiction of the District Court, filed exceptive allegations (R. 11–13) setting forth the following facts: In April 1941 the British government, pursuant to the Lend-Lease Act (see Appendix, pp. 19–21, *infra*), requisitioned from the United States a vessel of the type of the *Mormacland* for use as a naval vessel of war. To fill this requisition, the United States Maritime Commission purchased the motor vessel *Mormacland,* and after having her reconditioned by the United States Navy, delivered her to the British government on November 17, 1941, pursuant to the Lend-Lease Act. Upon delivery of the vessel, Their Lord Commissioners of the Admiralty, on behalf of His Brittanic Majesty, executed a receipt which recited acceptance of "physical delivery of the vessel named *Archer* (ex-*Mormacland*), * * * said delivery being made pursuant to the" Lend-Lease Act "for utilization under charter or other arrangements to be hereafter mutually agreed upon." From November 17, 1941, and continuously thereafter (including the date of the collision), the motor vessel was in the possession and under the exclusive command and control of the British government, which renamed her the H. M. S. *Archer,* and commissioned, officered, manned, supplied, and operated her as a unit of the Royal Navy.

Emergency conditions had required actual delivery of the vessel in advance and in anticipa-

tion of a Master Agreement to be entered into between the two governments. Such an agreement was executed on February 23, 1942, providing for mutual aid between the two governments, and reciting the expediency of deferring final determination of the terms and conditions upon which aid would be interchanged until the progress of events had made clearer what the final terms should be. Article I of the Master Agreement provided that the United States would continue to supply the United Kingdom with such defense articles, services, and information as the President should authorize. Article V provided that the United Kingdom would return at the end of the emergency, as determined by the President, such articles transferred under said Agreement (and not destroyed, lost, or consumed) as should be determined by the President to be useful in the defense of the United States or the western hemisphere or to be of use otherwise to the United States (R. 12–13).[1]

The exceptive allegations concluded that, by reason of the foregoing facts, the proceedings in the District Court were outside the scope of the Suits in Admiralty Act of 1920 and the Public Vessels Act of 1925 (see Appendix, pp. 15–19, *infra*) and constituted a suit against the United States

[1] The Agreement is set forth in *Report on the First Year of Lend-Lease Operations*, H. Doc. No. 661, 77th Cong., 2d Sess., pp. 50–52.

without its consent.[2] Libelant moved to strike the exceptive allegations, and on April 3, 1943, District Judge Caffey, accepting as true the facts set up in the allegations, granted the motion on the ground that the H. M. S. *Archer* was a "public vessel of the United States" within the meaning of the Public Vessels Act (R. 17–29).

After setting forth the above facts, the petition for a writ of prohibition and/or mandamus alleged that the conclusions of Judge Caffey were erroneous, and that the court had no jurisdiction of the cause (R. 6).[3] On July 20 1943, the court below permitted the United States to file the petition, and ordered the respondents to show cause why the requested writs should not issue (R. 32–34). After argument was heard and briefs were

[2] Following the filing of the exceptive allegations, certain parties obtained leave of the court to intervene as owners of the cargo laden on the *Brazos*, and filed a petition substantially the same as the libel, seeking recovery of $142,000 from the United States (R. 13–17). The United States consented to the intervention without prejudice to its exceptive allegations and it was agreed by the intervening petitioners that the exceptive allegations be considered as applying to the intervening petition as well as to the libel (R. 5).

[3] On May 3, 1943, the Government's motion for leave to file its petition was denied by the court below "for want of jurisdiction" (R. 30). Thereupon the United States filed in this Court a motion for leave to file an original petition for a writ of prohibition and/or mandamus and, in the alternative, for a writ of certiorari (*Ex Parte United States of America*, No. 15, Original, October Term, 1942). This Court, on June 7, 1943, granted the petition for a writ of certiorari, vacated the order of the court below, and denied the "other relief sought by the Government * * *, without prejudice to an application to the Circuit Court of Appeals" (R. 31–32).

filed, the petition of the United States was granted in all respects (R. 47–49), the court in an opinion dated March 3, 1944, holding that the H. M. S. *Archer* was not a "public vessel of the United States" within the meaning of the Public Vessels Act (R. 40–41). A petition for rehearing (R. 42–45) was denied March 23, 1944 (R. 47).

ARGUMENT

While the question presented is important, the decision below is so clearly correct that we believe further review is not warranted. If petitioner were to prevail in this case, the United States would be subjected to liability not merely for its own torts, but for torts of the British Navy whenever the vessel involved was transferred under the Lend-Lease Act. Nothing in either the Public Vessels Act or its legislative history suggests the assumption of so broad and so novel a liability.

1. The Act permits suit only where the damages were caused by a "public vessel of the United States" (see Appendix, p. 15, *infra*). While the phrase "public vessel of the United States" is not defined in the Act, Section 4 of the Act shows that Congress intended to include only vessels which are under the "control" of the United States at the time the cause of action arises. Section 4 provides that—

> No officer or member of the crew of any public vessel of the United States may be

> subpoenaed in connection with any suit authorized under this Act without the consent of the secretary of the department or the head of any independent establishment of the Government *having control of the vessel at the time the cause of action arose,* or of the master or commanding officer of such vessel at the time of the issuance of such subpoena. [Italics supplied.]

This section can apply only to a vessel in the "control" of some department or establishment of the Government "at the time the cause of action arose." For although a subpoena may be issued under Section 4 upon the consent "of the master or commanding officer of such vessel at the time of the issuance of the subpoena," the use of the term "*such* vessel" plainly relates back to the preceding phrase describing a vessel of which the governmental agency had "control * * * at the time the cause of action arose."

This requirement of "control" is also to be found in the legislative history. The Committee Reports recommending adoption of the bill which became the Public Vessels Act contemplate an assumption of liability only for the torts of the Government's agents—persons who by definition would be subject to the "control" of the United States. S. Rep. No. 941 (68th Cong., 2nd Sess.). Recognizing the injustice of a system of relief by private act, the reports quote with approval from a decision of the Court of Claims (*Walton* v. *United States,* 24 C. Cls. 372), suggesting "the line

where the responsibility of the Government should be drawn in cases where the private rights of the citizen have been violated by the negligence of public authority." It describes two classes of cases where "the United States and all other sovereign governments" should be responsible for injuries *"occasioned by the negligence of their agents"*: (1) "where the Government, *through its agents,* manages or controls property from which it receives a benefit or profit"; and (2) "where the Government is using or managing property *through its agents* under circumstances *where these agents* mingle on terms of equality with the general mass of citizens." In the latter case, the quotation continues, "Congress has always recognized the obligation of the Government for injuries *occasioned by the fault of the officers of its naval and other vessels* in maritime collisions." [Italics supplied.] 24 C. Cls. at 377, 379, 380.[4]

The correlation of "control" and sovereign responsibility is not a new departure. It finds precedent in the well settled rule that a vessel owned by a sovereign, but not in the possession and control of its government and not operated by it in its public service, is not a "public vessel" of that sovereign, so as to immunize it from process. *Compania Espanola* v. *Navemar,* 303 U. S. 68, 74;

[4] The quotation in the Court of Claims' opinion is in turn taken, with approval, from a Senate report on a special act of Congress.

The Western Maid, 257 U. S. 419; *The Davis,* 10 Wall. 15; *The Attualita,* 238 Fed. 909 (C. C. A. 4); *The Carlo Poma,* 259 Fed. 369 (C. C. A. 2); *Long* v. *The Tampico,* 16 Fed. 491 (S. D. N. Y.). And Chief Justice Marshall defined an "armed public vessel of the sovereign" as a ship which "constitutes a part of the military force of her nation; *acts under the immediate and direct command of the sovereign;* is employed by him in national objects." [Italics supplied.] *The Exchange,* 7 Cranch 116, 143. The petition below makes it plain that the *Archer* was not acting under "the immediate and direct command" of the United States at the time it collided with the *Brazos.*

Moreover, the underlying purpose of the Public Vessels Act was to provide a judicial remedy, where none was available because of the sovereign immunity from suit.[5] Petitioner admits that, but for the statute of limitations, the owners of the *Brazos* could have obtained redress for their injury in the courts of Great Britain (Pet. 11).

[5] In describing the basic evil to be eradicated, the Committee Reports on the bill state (S. Rep. No. 941, 68th Cong., 2nd Sess., p. 2; H. Rep. No. 913, 68th Cong., 1st Sess., p. 2):

"Under the law as it now stands, *no judicial relief is available* to a shipowner * * *. *His only recourse* is to apply to Congress for a private act, which will enable him to have the matter adjudicated in a district court of the United States, or in the Court of Claims. * * * The result is that, if he does succeed in securing *an opportunity to present his claim to a judicial tribunal,* it often happens that, in the press of public business, years may elapse before the desired result is obtained." [Italics supplied.]

Since a remedy was available to the owners of the *Brazos* in a "judicial tribunal," the basic purpose of the Act is inapplicable, requiring exclusion of the instant claim even if it were to fall verbally within the terms of the Act. Cf. *Dobson* v. *United States,* 27 F. (2d) 807 (C. C. A. 2), certiorari denied, 278 U. S. 653; *O'Neal* v. *United States,* 11 F. (2d) 869 (E. D. N. Y.), affirmed, *per curiam,* 11 F. (2d) 871 (C. C. A. 2).

Petitioner puts considerable reliance on the alleged fact that the United States remained the owner of the *Archer.* But there is nothing to show that legal title to the *Archer* was retained and not transferred to the British government. As the court below observed, "the question of her ultimate disposition, and indeed of her actual ownership, was left at large by the Lend-Lease Act and by the receipt given at the time of her transfer" (R. 41). In any event, the question whether the United States intended to assume liability for torts of the agents of a foreign sovereign should not be determined by rules applicable to ordinary business transactions. Bare legal title devoid of other indicia of ownership is often of little weight in fixing legal rights and liabilities. Cf. *Baltimore Dry Docks & Ship Building Co.* v. *New York & P. R. S. S. Co.,* 262 Fed. 485 (C. C. A. 4).

2. Petitioner contends (Pet. 17–20) that the Act imposes liability upon the United States in any

circumstances where the vessel, if privately owned, would be liable *in rem* for acts and omissions of her personnel. This construction of the Act finds no support in its language or its legislative history.[6] Unlike the Suits in Admiralty Act of 1920, which authorizes a libel *in personam* against the United States "in cases where if such vessel were privately owned or operated * * * a proceeding in admiralty could be maintained" (Sec. 2; Appendix, p. 17, *infra*), the Public Vessels Act authorizes such a libel only where the damage is "caused by a public vessel of the United States." (Sec. 1; Appendix, p. 15, *infra.*) This use of entirely different language in Section 1 of the Public Vessels Act and Section 2 of the Suits in Admiralty Act, each delineating the scope of the Act involved, shows clearly that the two Acts were not intended to be coextensive. Where Congress wished to adopt the same provi-

[6] Petitioner (Pet. p. 18) purports to find support for his construction in the Attorney General's letter to the Committee on Claims commenting on the bill, but the Attorney General's remarks were to the contrary, for he stated:

"* * * Suggestions which have come to my notice favoring the bill include the view that the practice of admiralty and international law and procedure place such torts separate and apart from the ordinary torts committed on land, as the vessel is defined the offender rather than the owner of the vessel. The Supreme Court in the *Western Maid* group of cases (257 U. S. 419), has decided to the contrary. * * *" S. Rep. No. 941, 68th Cong., 2d Sess., p. 11; H. Rep. No. 913, 68th Cong., 1st Sess., p. 11.

sions for both Acts, it did so expressly—in the case of procedure (Sec. 2 of the Public Vessels Act).

Section 2 of the Public Vessels Act, providing that suits thereunder "shall be subject to and proceed in accordance with the provisions" of Section 3 of the Suits in Admiralty Act "in so far as the same are not inconsistent herewith," is intended merely to incorporate the procedure for trial of suits authorized by Section 1 of the Public Vessels Act. Even if Section 3 of the Suits in Admiralty Act also extended to substantive matters, it could not broaden the liability imposed by Section 1 of the Public Vessels Act, for to that extent Section 3 of the Suits in Admiralty Act would be "inconsistent" with Section 1 of the Public Vessels Act.

CONCLUSION

The decision below is clearly correct. Any doubt that the instant case is outside the purview of the Public Vessels Act of 1925 is easily counterbalanced by the fact that the Act as a waiver of sovereign immunity must be strictly construed, *United States* v. *Sherwood,* 312 U. S. 584, 590; *State of Maine* v. *United States,* 45 F. Supp. 35, affirmed, 134 F. (2d) 574, (C. C. A. 1), certiorari denied, 319 U. S. 772, and the fact that the novel disposition of vessels provided for by the Lend-Lease Act was completely unknown to Congress at the time the Public Vessels Act was adopted.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
DAVID L. KREEGER,
Special Assistant to the Attorney General.
JOSEPH B. GOLDMAN,
Attorney.

SEPTEMBER 1944.

APPENDIX

1. The Public Vessels Act of 1925, 43 Stat. 1112–1113 (46 U. S. C. 781–790), provides in pertinent part as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920.
>
> SEC. 2. That such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of an Act entitled "An Act

authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes," approved March 9, 1920, or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

* * * * *

SEC. 4. That no officer or member of the crew of any public vessel of the United States may be subpoenaed in connection with any suit authorized under this Act without the consent of the secretary of the department or the head of any independent establishment of the Government having control of the vessel at the time the cause of action arose, or of the master or commanding officer of such vessel at the time of the issuance of such subpoena.

* * * * *

SEC. 8. Nothing contained in this Act shall be construed to recognize the existence of or as creating a lien against any public vessel of the United States.

2. The Suits in Admiralty Act of 1920, 41 Stat. 525 (46 U. S. C. 741–752), provides in pertinent part as follows:

CHAP. 95.—An Act Authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attach-

ment in foreign jurisdictions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States at-

torney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

SEC. 3. That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither

the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation heretofore given in admiralty causes by the United States, the United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation, shall become void and be surrendered and canceled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 8 of this Act.

3. The Lend-Lease Act of March 11, 1941, 55 Stat. 31 (22 U. S. C. (Supp. I) sections 411–422) provides in pertinent part as follows:

SEC. 3. (a) Notwithstanding the provisions of any other law, the President may, from time to time, when he deems it in the interest of national defense, authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government—

(1) To manufacture in arsenals, factories, and shipyards under their jurisdiction, or otherwise procure, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for the government of any country whose defense the President deems vital to the defense of the United States.

(2) To sell, transfer title to, exchange, lease, lend, or otherwise dispose of, to any such government any defense article, but no

defense article not manufactured or procured under paragraph (1) shall in any way be disposed of under this paragraph, except after consultation with the Chief of Staff of the Army or the Chief of Naval Operations of the Navy, or both. The value of defense articles disposed of in any way under authority of this paragraph, and procured from funds heretofore appropriated, shall not exceed $1,300,000,000. The value of such defense articles shall be determined by the head of the department or agency concerned or such other department, agency or officer as shall be designated in the manner provided in the rules and regulations issued hereunder. Defense articles procured from funds hereafter appropriated to any department or agency of the Government, other than from funds authorized to be appropriated under this Act, shall not be disposed of in any way under authority of this paragraph except to the extent hereafter authorized by the Congress in the Acts appropriating such funds or otherwise.

* * * * *

(b) The terms and conditions upon which any such foreign government receives any aid authorized under subsection (a) shall be those which the President deems satisfactory, and the benefit to the United States may be payment or repayment in kind or property, or any other direct or indirect benefit which the President deems satisfactory.

* * * * *

(d) Nothing in this Act shall be construed to authorize or to permit the authorization of convoying vessels by naval vessels of the United States.

(e) Nothing in this Act shall be construed to authorize or to permit the authorization of the entry of any American vessel into a combat area in violation of section 3 of the Neutrality Act of 1939.

SEC. 4. All contracts or agreements made for the disposition of any defense article or defense information pursuant to section 3 shall contain a clause by which the foreign government undertakes that it will not, without the consent of the President, transfer title to or possession of such defense article or defense information by gift, sale, or otherwise, or permit its use by anyone not an officer, employee, or agent of such foreign government.

U. S. GOVERNMENT PRINTING OFFICE: 1944

(30)

FILED
SEP 30 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1944

No. 361

In the Matter of the Application of the

UNITED STATES OF AMERICA,
Respondent,

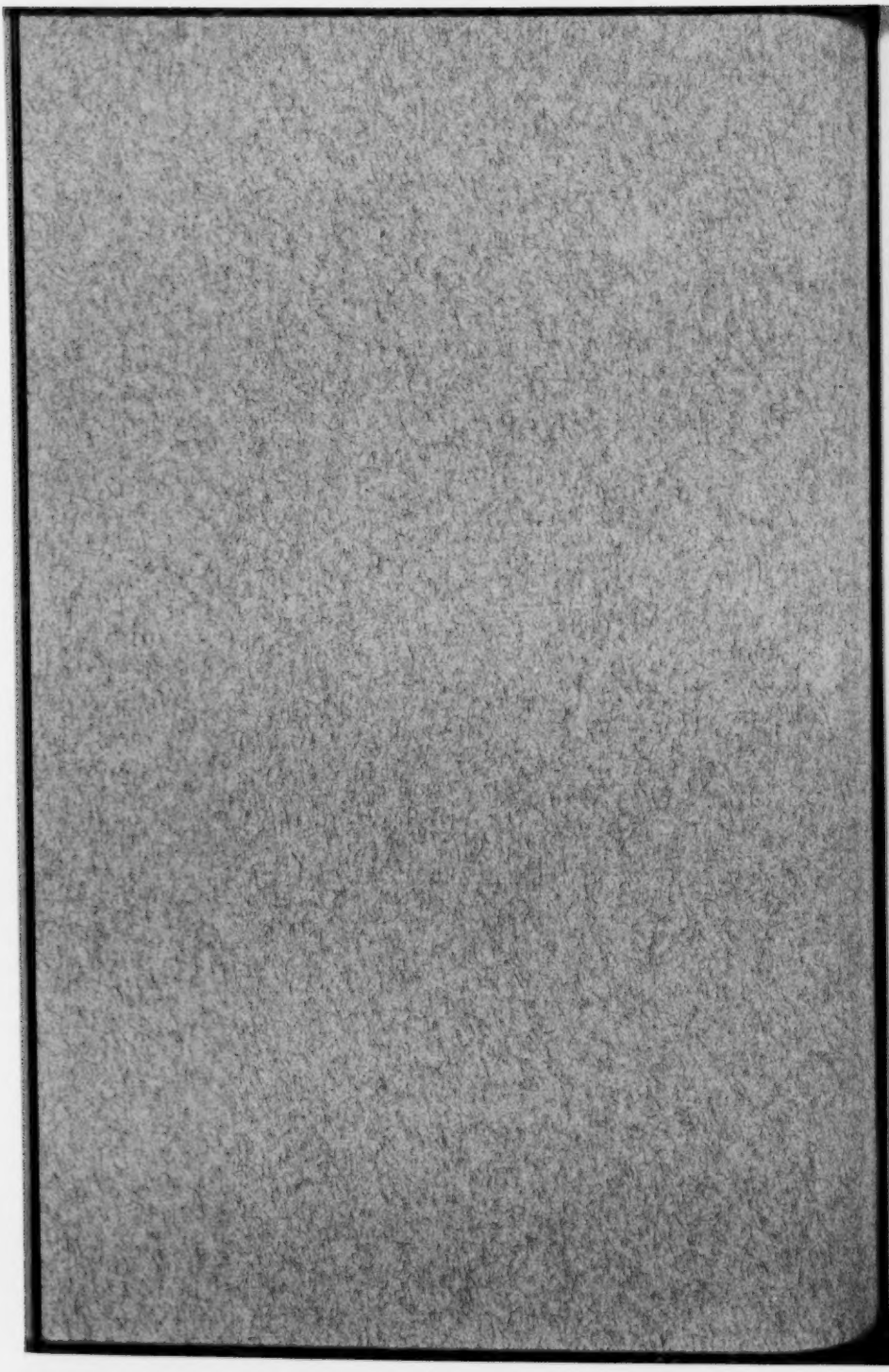
for a Writ of Prohibition and/or Mandamus

against

The HONORABLE FRANCIS G. CAFFEY, Judge of the District Court of the United States for the Southern District of New York, et al.,
Petitioners.

REPLY BRIEF IN SUPPORT OF PETITION

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
LEONARD J. MATTESON,
RICHARD F. SHAW,
Counsel for Petitioners.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1944

No. 361

In the Matter of the Application of the
UNITED STATES OF AMERICA,
Respondent,
for a Writ of Prohibition and/or Mandamus
against
The HONORABLE FRANCIS G. CAFFEY, Judge of the District Court of the United States for the Southern District of New York, et al.,
Petitioners.

REPLY BRIEF IN SUPPORT OF PETITION

FIRST POINT

The question presented by this petition for certiorari is misstated in respondent's brief in opposition at page 2. The ownership of the *Archer* by the United States is not mentioned.

Petitioners do not claim that suit may be brought against the United States under the Public Vessels Act except in a case where, as here, the public vessel is owned by the United States. Counsel for respondent go so far as to say (Brief, page 11):

> "But there is nothing to show that legal title to the *Archer* was retained and not transferred to the British Government."

Quite the contrary is true. The libel alleges (R. 8):

> "At all the times hereinafter mentioned respondent was and now is a corporation sovereign and owner of the motor vessel formerly named *'Mormacland'* [*Archer*]."

Respondent's exceptive allegations allege that in May, 1941, the United States Maritime Commission "purchased the *Mormacland* and the United States thereupon became the owner thereof" (R. 11).

There is no allegation in the exceptive allegations or elsewhere that the United States ever parted with ownership. The allegation in the exceptive allegation is only that the United States parted with physical possession, viz.:

> "Thereupon, and on November 17, 1941, the said vessel was physically delivered by the Maritime Commission to their Lords Commissioners of the Admiralty * * *" (R. 12).

For the purposes of this proceeding the allegations of the libel must be accepted as true except as contradicted by the exceptive allegations, and the exceptive allegations must be accepted as true. The libellants in the admiralty suit alleged that the United States owned the *Archer*. The respondent alleged that it bought the *Archer* and has never alleged that it parted with ownership. Therefore, this petition must be determined upon the assumption that respondent owned the *Archer* at the time of the collision.

Below, respondent's counsel admitted (footnote to their brief at page 4) that the exceptive allegation that the American documentation of the *Archer* was cancelled when she was delivered to the British was in error. That footnote said in part:

> "The exceptive allegations state further that prior to delivery the American documentation of the vessel was cancelled. This statement was predicated upon information later found to have been in error. * * * "

Indeed, the Court below may have granted respondent's petition in part upon the erroneous assumption that respondent did not own the *Archer,* for it said:

> "Notwithstanding her American documentation and the fact that the question of her ultimate disposition, and indeed of her actual ownership, was left at large by the Lend-Lease Act * * *."

Perhaps later our Government and the British may agree that title shall be deemed to have passed to the British as of the date of her original delivery. Patently, however, ownership had not been transferred to the British when the *Brazos* was sunk, i.e., when the rights of the libellants in the admiralty suit accrued. For the purposes of this proceeding, ownership of the *Archer* by the United States cannot be gainsaid.

If at the trial of the admiralty suit the Government can prove that it did not own the *Archer,* the libel will, of course, be dismissed.

Respectfully submitted,

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
LEONARD J. MATTESON,
RICHARD F. SHAW,
Counsel for Petitioners.

New York, N. Y.,
September 28, 1944.

(P-654)

(31)

FILED
OCT 27 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

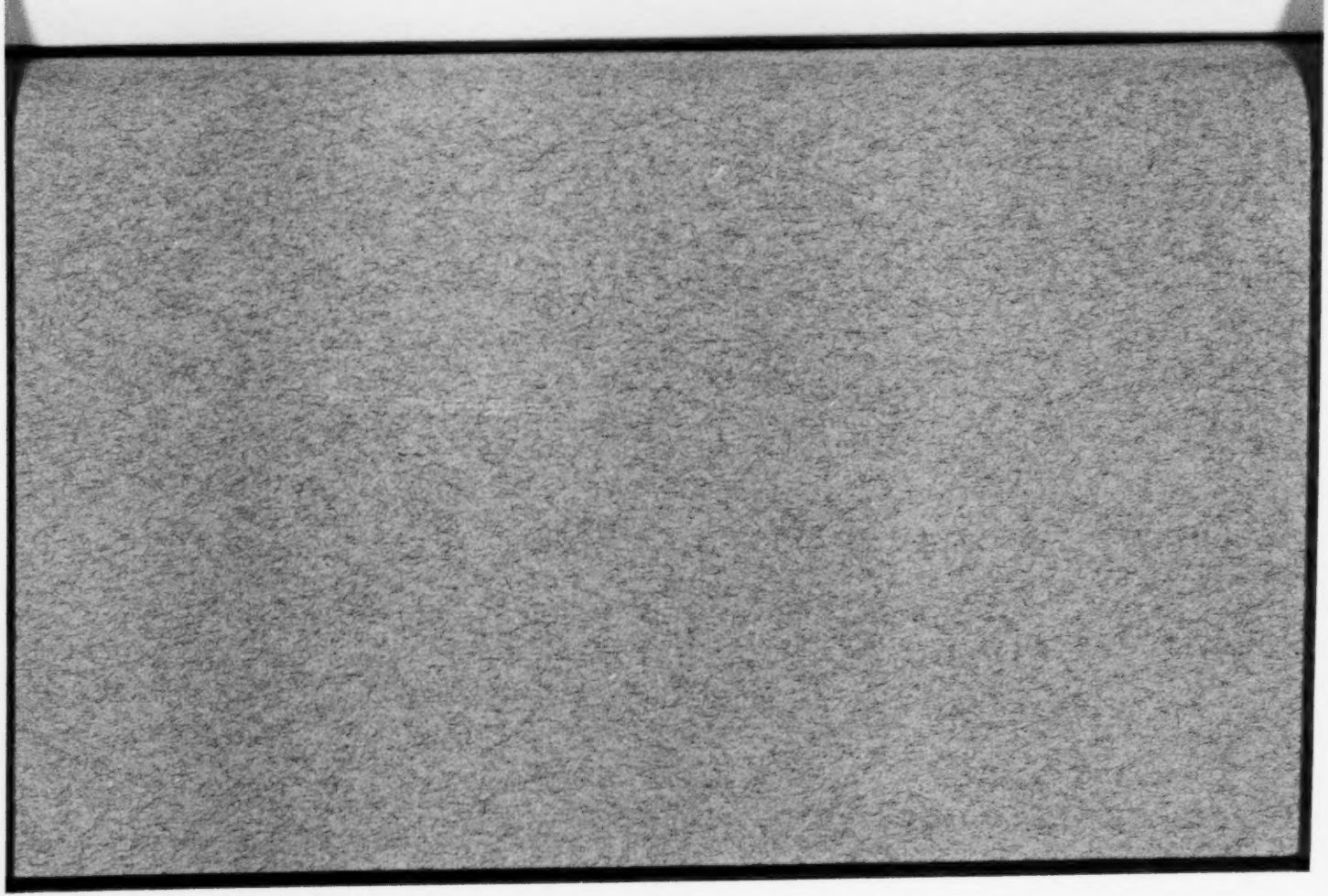
OCTOBER TERM 1944

No. 361

In the Matter of the Application of the
UNITED STATES OF AMERICA,
Respondent,
for a Writ of Prohibition and/or Mandamus
against
The HONORABLE FRANCIS G. CAFFEY, Judge of the District Court of the United States for the Southern District of New York, et al.,
Petitioners.

PETITION FOR REHEARING

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
LEONARD J. MATTESON,
RICHARD F. SHAW,
Counsel for Petitioners.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1944

No. 361

In the Matter of the Application of the
UNITED STATES OF AMERICA,
Respondent,
for a Writ of Prohibition and/or Mandamus
against
The HONORABLE FRANCIS G. CAFFEY, Judge of the District Court of the United States for the Southern District of New York, et al.,
Petitioners.

PETITION FOR REHEARING

COME NOW the above named the Honorable Francis G. Caffey, Judge of the District Court of the United States for the Southern District of New York, et al., and present this, their petition for a rehearing on their petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit in the above entitled cause, and, in support thereof, respectfully show:

The petition for a writ of certiorari in this case was filed August 30, 1944.

The order of this Court denying the petition for certiorari was entered October 16, 1944.

On October 9, 1944 this Court granted a petition for certiorari in Case No. 279 October Term 1944, Canadian Aviator, Ltd., petitioner, against United States of America, respondent.

Closely related questions involving the same provisions of the same Statute, Public Vessels Act, Title 46, U. S. Code, §§781-790, authorizing suit against the United States to recover for damages sustained by a privately owned vessel "caused by a public vessel of the United States * * *" are presented in these two cases.

The actions involved both in No. 279 and in this case are suits against the United States under the provisions of the Public Vessels Act for damage alleged to have been "caused by a public vessel of the United States". In each action the libellant elected to proceed in accordance with the principles of libels *in rem* as well as *in personam*. Such election was deemed to have been authorized by the provisions of Section 2 of the Public Vessels Act, reading as follows:

> "* * * Such suits shall be subject to and proceed in accordance with the provisions of Chapter 20 or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed."

Chapter 20 referred to is the Suits in Admiralty Act, Section 3, which provides in part:

> "Such suits shall proceed and be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties * * *. If the libellant so elects in his libel, suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libellant in any proper case from seeking relief in personam in the same suit * * *" (46 U. S. Code, §743).

Both in No. 279 and in this case the question is presented whether the Public Vessels Act does in fact author-

ize a suit against the United States to proceed in accordance with the principles of a libel *in rem*, and if so the limitations, if any, on the principles of a libel *in rem* as applied to such a suit. Cf. Third Point, Petitioners' Brief in No. 279, p. 18, and Fourth Point of Petitioners' Brief in this case, p. 17.

As this case now stands the decision of the Circuit Court of Appeals may well be considered as authority for the proposition that the Public Vessels Act does not authorize a suit *in personam* against the United States on the principles of a libel *in rem*. Such a proposition is directly opposed to the view expressed by the Attorney General (now Mr. Chief Justice Stone) in his letter to the Committee on Claims concerning the bill which became the Public Vessels Act. See Petitioners' Brief, p. 18.

Both this case and No. 279 for their decision require a review of the legislative history of the Public Vessels Act with view to discovering the legislative intent as disclosed thereby. Cf. Second Point, Petitioners' Brief, in No. 279, p. 14, and Third Point of Petitioners' Brief in this case, p. 14.

Case No. 279 further involves the question under what circumstances damage is considered to have been "done by" a public vessel of the United States and this case involves the question under what circumstances a vessel will be considered to be "a public vessel of the United States".

If a writ of certiorari were to be granted in this case and this case were to be argued together with No. 279 many considerations would be pertinent to both cases and the same counsel are involved except that in this case counsel representing the cargo interest appear jointly with counsel representing the vessel interest.

The question presented in this case is of at least as great importance to owners of vessels and other property in this country as the question presented in Case No. 279, for the decision of the Circuit Court of Appeals in this case wholly excludes such owners from the benefits of the Act in a large class of cases, whereas Case No. 279 involves only a limitation on the scope of the relief granted where the public vessel involved is admittedly one with respect to which relief is granted by the Act when damage is done by such vessel.

The decision of the Circuit Court of Appeals in this case refusing relief under the Public Vessels Act to the owners of the *Brazos* for damage done by a public vessel owned by the United States (*The Archer*) has denied the principle of reciprocity on which the Public Vessels Act is based,—namely, that in cases where suit could be maintained by the United States as owner of the public vessel against the privately owned vessel for damage caused by collision, a suit may likewise be brought by the owner of the privately owned vessel against the United States. See Petitioners' Brief, pp. 15, 16. The *Archer,* which collided with and sank the *Brazos,* was owned by the United States and, even though the *Archer* had been chartered or lease-loaned to the British Government, the United States as owner of the *Archer* could have maintained an action against the *Brazos* or her owner for damage resulting from the collision and undoubtedly would have brought such action except for the sinking of the *Brazos* and the larger loss sustained by her owners. Yet the owners of the *Brazos* have been denied the right to maintain this action against the United States.

The question presented by the petition in this case is stated at p. 5 of the petition as follows:

> "Does the Public Vessels Act, Title 46, U. S. Code, §§ 781-790, authorize suit against the United States on principles of in rem liability to recover damages caused by a war vessel owned by, and documented as, a vessel of the United States but in the possession of the British Government and operated as a unit of its Navy pursuant to the provisions of the Lend-Lease Act in the interest of the national defense of the United States?"

For the foregoing reasons, it is respectfully urged that this petition for a rehearing on the petition for a writ of certiorari be allowed, and that upon further consideration the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit in the above entitled cause be granted, and that this case be set for argument to follow No. 279, October Term 1944, on the Calendar of this Court.

Respectfully submitted,

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
LEONARD J. MATTESON,
RICHARD F. SHAW,
Counsel for Petitioners.

Certificate of Counsel

I, CHAUNCEY I. CLARK, counsel for the above named petitioners, do hereby certify that the foregoing petition for a rehearing on the petition for a writ of certiorari in the above entitled cause is presented in good faith and not for delay.

CHAUNCEY I. CLARK,
Counsel for Petitioners.

(P-694)